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In The

Supreme Court of the United States

October Term, 1992

WILLIAM POLLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Table of Citations ii

Introductory Statement 1

Reply to Brief in Opposition 1

I. The Opposition Brief confuses the issue of multiplicity with the issue of double jeopardy; although the former was waived by Defendant's guilty plea, the latter was not. 1

II. The Petition for Certiorari is supported by Respondent's acknowledgment that no case has decided the precise question presented here, that of the appropriate unit of prosecution under 26 U.S.C. § 7201. 4

III. The proper unit of prosecution is governed by congressional intent; whether each additional attempt increases the likelihood of successful tax evasion is irrelevant. 4

IV. The unit of prosecution will continue to have an impact on sentences for offenses occurring after November 1, 1987, the effective date of the Sentencing Guidelines. 6

Conclusion 8

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Menna v. New York, 423 U.S. 61 (1975) 3

Ray v. United States, 481 U.S. 736 (1987) 7

United States v. Barel, 939 F.2d 26 (3d Cir. 1991) 7

United States v. Blocker, 802 F.2d 1102 (9th Cir. 1986) .. 3

United States v. Bonavia, 927 F.2d 565 (11th Cir. 1991) .. 2

United States v. Bough, 787 F.2d 1131 (7th Cir. 1986) ... 3

United States v. Broce, 488 U.S. 563 (1989) 3

United States v. Dashney, 937 F.2d 532 (10th Cir.), cert. denied, 112 S. Ct. 402 (1991) 5

United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991), cert. denied, 112 S. Ct. 871 (1992) 5

United States v. Davis, 799 F.2d 1490 (11th Cir. 1986) ... 2

United States v. Heath, 970 F.2d 1397 (5th Cir. 1992) 5

United States v. Marino, 682 F.2d 449 (3d Cir. 1982) 3

United States v. Mastrangelo, 733 F.2d 793 (11th Cir. 1984) 1

Contents

	Page
United States v. McCarty, 611 F.2d 220 (8th Cir. 1979) . . .	5
United States v. Osunegbu, 822 F.2d 472 (5th Cir. 1987)	2
United States v. Podell, 869 F.2d 328 (7th Cir. 1989)	3
United States v. Pollen, 978 F.2d 78 (3d Cir. 1992)	1
United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976), cert. denied, 431 U.S. 965 (1977)	3
United States v. Stovall, 825 F.2d 817 (5th Cir. 1987)	2
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952)	5
Statutes Cited:	
18 U.S.C. § 1334	5
18 U.S.C. § 3013(a)	7
26 U.S.C. § 7201	1, 4, 6, 7
31 U.S.C. § 5324(3)	5

INTRODUCTORY STATEMENT

Petitioner files this Reply to theBrief in Opposition in order to correct certain fundamental errors contained in the Brief for the United States in Opposition ("Opposition Brief") and to highlight the fact, stated in the Opposition Brief, that this Court has never decided the important issue of the proper unit of prosecution under the federal tax evasion statute, 26 U.S.C. § 7201.

REPLY TO BRIEF IN OPPOSITION

I.

THE OPPOSITION BRIEF CONFUSES THE ISSUE OF MULTIPLICITY WITH THE ISSUE OF DOUBLE JEOPARDY; ALTHOUGH THE FORMER WAS WAIVED BY DEFENDANT'S GUILTY PLEA, THE LATTER WAS NOT.

Respondent states that Petitioner "waived his multiplicity claim when he pleaded guilty to four of the offenses charged in the indictment" (Opposition Brief, at 7), implying that this waiver should bar Petitioner's double jeopardy claim on appeal. The Court of Appeals for the Third Circuit rejected this waiver argument in this case, *United States v. Pollen,* 978 F.2d 78, 84 (3d Cir. 1992), and considered the merits of Defendant's double jeopardy argument. The Government's waiver argument is wrong for the reasons stated by the Third Circuit in this case.

Failure to raise the issue of multiplicity of the indictment below does not constitute a waiver of Defendant's claim of illegal multiplicity of sentences. Courts of appeals which have considered this issue have rejected such claims by the Government. In *United States v. Mastrangelo,* 733 F.2d 793, 800 (11th Cir. 1984), the Eleventh Circuit stated that although a failure to raise below the issue of multiplicity of the indictment does bar a

defendant on appeal from asserting that he cannot be indicted or convicted twice for the same crime, nonetheless, "he may challenge the imposition of multiple sentences for the alleged commission of one crime." *See also, United States v. Bonavia*, 927 F.2d 565, 571 (11th Cir. 1991); *United States v. Davis*, 799 F.2d 1490, 1494 (11th Cir. 1986). Likewise, the Fifth Circuit has held that:

> The Government asserts that [the defendant] has waived any opportunity to complain about multiplicity .... We note however, that [defendant's] complaint on appeal goes to the multiplicity of sentences imposed and does not directly challenge the multiplicity in the indictment. This distinction has been recognized by the courts. Multiplicity of an indictment must be raised as a defense pursuant to Fed. R. Crim. P. 12(b) to be preserved for appeal. A complaint about multiplicity of sentences however can be raised for the first time on appeal.

United States v. Stovall, 825 F.2d 817, 821 (5th Cir. 1987) (citations omitted); *see also, United States v. Osunegbu*, 822 F.2d 472, 481 n. 26 (5th Cir. 1987).

Similarly, the Sixth Circuit has stated that:

> The argument that one waives his right to object to the imposition of multiple sentences by his failure to object to the multiplicious nature of an indictment is a *non sequitur*. Rule 12 applies only to objections with regard to error in the indictment itself; the effect of Rule 12 is that dismissal of a multiplicitous

> indictment is not required [if not raised below]; however, if sentences are imposed on each count of that multiplicitous indictment the defendant is not forced to serve the erroneous sentence because of any waiver.

United States v. Rosenbarger, 536 F.2d 715, 721-22 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *see also, United States v. Blocker*, 802 F.2d 1102, 1103 (9th Cir. 1986) (same holding, where defendant entered a guilty plea and appealed his sentence); *United States v. Bough*, 787 F.2d 1131, 1132 (7th Cir. 1986) (guilty plea does not waive double jeopardy challenge to indictment judged deficient on its face); *United States v. Marino*, 682 F.2d 449, 454 n. 3 (3d Cir. 1982).

United States v. Broce, 488 U.S. 563 (1989), relied on by the Government (Opposition Brief, at 7), does not overrule the holdings of these cases when the defect in the indictment is apparent on its face, as it is here. *Broce* held that "a plea of guilty to a charge does not waive a claim that — *judged on its face* — the charge is one which the [Government] may not constitutionally prosecute." 488 U.S. at 575 (emphasis in original), *quoting Menna v. New York*, 423 U.S. 61, 63 n. 2 (1975). Thus, *Broce* emphasized that where the existing record may be relied on to determine legality of punishment, a challenge to the punishment will not be waived by entry of a guilty plea. The deficiency in the instant indictment is apparent on its face, and hence this appellate challenge is not precluded by *Broce*.[1]

1. The "plain error" doctrine would also require review of Petitioner's sentence here. *E.g., United States v. Podell*, 869 F.2d 328, 332 (7th Cir. 1989). In *Podell*, the Seventh Circuit found plain error in a situation such as that here, stating that: "Convictions and sentences that expose a defendant to double jeopardy are illegal, and result in miscarriages of justice. Therefore, we hold that the district court committed plain error in allowing the defendant to be convicted on [2 counts] of the indictment. . . ."

II.

THE PETITION FOR CERTIORARI IS SUPPORTED BY RESPONDENT'S ACKNOWLEDGMENT THAT NO CASE HAS DECIDED THE PRECISE QUESTION PRESENTED HERE, THAT OF THE APPROPRIATE UNIT OF PROSECUTION UNDER 26 U.S.C. § 7201.

Respondent argues that the decision in this case does not conflict with that of any other court of appeals because no other court of appeals has decided the precise question presented here (Opposition Brief, at 9). Even if true (*but see* discussion in Petition, at 7-8), this statement highlights the fact that the issue presented herein is an important one, yet undecided, which should be decided by this Court.

III.

THE PROPER UNIT OF PROSECUTION IS GOVERNED BY CONGRESSIONAL INTENT; WHETHER EACH ADDITIONAL ATTEMPT INCREASES THE LIKELIHOOD OF SUCCESSFUL TAX EVASION IS IRRELEVANT.

Respondent agrees that it is congressional intent which establishes the appropriate unit of prosecution under a criminal statute (Opposition Brief, at 7). However, the Opposition Brief makes the inconsistent argument that: "Each time a taxpayer engages in an act of evasion, he increases the likelihood of his success, increases the amount of tax that may ultimately be evaded . . . and increases the potential cost of IRS's enforcement efforts," suggesting that this fact somehow supports the position that the proper unit of prosecution under 26 U.S.C. § 7201 is each separate attempt to evade a tax.

If this were true, then the unit of prosecution for any crime would be each attempt to commit it or each act to further it. For most federal crimes, this is not so. For example, this Court has found that it was the course of conduct which Congress meant to criminalize under the Fair Labor Standards Act ("FLSA") and not each act of failing to pay the minimum wage. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). FLSA treats as one offense all acts that "arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse.' " 344 U.S. at 224. A similar analysis applies here, where all actions taken by Petitioner were taken with the single intent to avoid payment of the specific tax(es) in question.

Similarly, 31 U.S.C. § 5324(3) makes it a crime to structure a transaction to avoid currency reporting requirements. Despite the Government's argument that each act in furtherance of the "structure" (*i.e.*, each deposit of under $10,000) may be charged as a separate violation (the same argument made here), both the Seventh and the Tenth Circuits have recently rejected this position and held that the *structured transaction* and not its components is the proper unit of prosecution. *United States v. Dashney*, 937 F.2d 532, 541-42 (10th Cir.), *cert. denied*, 112 S. Ct. 402 (1991); *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).

Likewise, each subsequent overt act does not constitute a separate conspiracy or crime if each such act advances only one scheme or agreement. *See, e.g., United States v. McCarty*, 611 F.2d 220, 223 (8th Cir. 1979). Similarly, in a bank fraud case brought under 18 U.S.C. § 1334, it is the scheme which is punishable, not each act in furtherance of it. *E.g., United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992) (indictment was multiplicitous, which charged two fraudulent acts as separate crimes).

Thus, the Government's argument that additional attempts

create greater harm begs the question and is a position which has been rejected in other "unit of prosecution" cases. It is also wrong. The true harm visited on the public by tax evasion, is the defendant's failure to pay the tax—not each attempt to avoid payment of the one sum of money.[2]

IV.

THE UNIT OF PROSECUTION WILL CONTINUE TO HAVE AN IMPACT ON SENTENCES FOR OFFENSES OCCURRING AFTER NOVEMBER 1, 1987, THE EFFECTIVE DATE OF THE SENTENCING GUIDELINES.

Respondent states that: "[F]or offenses occurring after November 1, 1987, the effective date of the Sentencing Guidelines, the resolution of the unit of prosecution issue in the case will not have any impact on the length of a defendant's sentence" (Opposition Brief, at 11). Respondent attempts to explain this faulty conclusion by stating that under the Guidelines, all counts involving substantially the same harm are grouped for sentencing purposes, and the total tax loss, not the number of violations, governs the sentence (Opposition Brief, at 10-11).

However, the maximum sentence for conviction on one count charging a violation of 26 U.S.C. § 7201 is five years. Therefore, in cases where the Guidelines score would permit or require imposition of a sentence of more than five years (or 60 months), it

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2. If one defendant engaged in seven transactions to secrete $100,000 that would otherwise be used to pay a tax due, and another defendant engaged in two transactions to accomplish the same end, the harm to the public—the loss of $100,000 in tax income—is exactly the same. Both these defendants should face the same single charge and be sentenced identically.

would make a difference whether a defendant were convicted of one or more section 7201 violations.[3]

In addition, the number of counts of conviction determines the amount of the special assessment which must be imposed on a defendant, pursuant to 18 U.S.C. § 3013(a). *See Ray v. United States*, 481 U.S. 736, 737 (1987); *United States v. Barel*, 939 F.2d 26, 36 (3d Cir. 1991) (special assessment imposed on each count of conviction precludes application of concurrent sentence doctrine). Thus, a defendant's sentence will continue to be influenced by the number of charges which the Government can bring against him under 26 U.S.C. § 7201, a number dictated by the unit of prosecution intended by Congress.

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3. The original Guidelines calculation in the instant case provides a good example of a Guidelines range of more than 60 months in a tax evasion case. Defendant's Guidelines score was originally calculated to be 23; his criminal offense category was 3. His resulting Guideline range of 57-71 months (App. 39a; 56a) would have allowed imposition of a Guidelines sentence of more than five years only if more than one Guidelines count had been charged. However, because Defendant was convicted on one Guidelines count, his Guidelines sentence was limited to one within the statutory five-year maximum. Only if a defendant were convicted of more than one Guidelines count and his Guidelines score were more than 60 months, could the court impose consecutive Guidelines sentences, resulting in a sentence of more than five years.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, it is respectfully submitted that a Writ of Certiorari should be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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